IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

FRIDAY, THE 27TH OCTOBER 2006 / 5TH KARTHIKA 1928

CRL.A.No. 2061 of 2006()

AGAINST THE ORDER DATED 20/01/2006 IN IN MC 9/2006 IN SC.659/2001 of ADDL.SESSIONS COURT-TRIAL OF ABKARI ACT CASES,NEYYATTINKARA

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APPELLANT: RESPONDENT

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1. SATHI DEVI, D/O.KRISHNAMMA PILLAI,
   UTHRADAM BHAVAN, ARAIYOOR DESOM, CHENKAL VILLAGE.

2. SASIKALA DEVI, D/O.KRISHNAMMA PILLAI,
   PUNAMKUDIKONAM KIZHAKKEKARA PUTHEN VEEDU,
   CHERIYAKOLLA DESOM, KUNNATHUKAL VILLAGE.

BY ADV. SRI.R.T.PRADEEP
SRI.V.VIJULAL

RESPONDENTS: PETITIONER

STATE OF KERALA REPRESENTED BY THE
DIRECTOR GENERAL OF PROSECUTION, HIGH COURT OF
KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. C.M.NAZAR.

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 27/10/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. HEMA, J.
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Crl.A. No.2061 of 2006
=.=.=.=.=.=.=.=.==.=..=.==.=.=.=.=.=.=.=.=.
Dated this 27th day of October, 2006.

JUDGMENT

This appeal is filed under section 446 of the Code of Criminal Procedure.

2. Appellants are sureties of the accused in a Sessions Case. The accused, along with the sureties, executed a bond for Rs.25,000/- for appearance of the accused in court. Thereafter, the accused absconded. Hence, the court found that accused forfeited the bond. A show cause notice was issued to the sureties under section 446 of the Code. First respondent before the lower court was not served with any notice. Second respondent was served, but she did not appear in court or show any cause for not imposing penalty. The court, hence, imposed a penalty of Rs.25,000/- each against the appellants. The court also found that, on failure to recover the amount under section 421 of the Code, the appellants shall undergo simple imprisonment for three months. The said order is under challenge.

3. Learned counsel appearing for the appellants submitted that the first appellant left for abroad and she is the wife of the accused. The accused committed suicide and a death certificate is also

produced. The first appellant was not aware of the accused's non-appearance in court. The 2nd appellant was also not aware that the accused was not appearing in court. According to appellants, the accused was very much available in the house and he had committed suicide there.

4. On going though the order under challenge, there is nothing to show that the court was satisfied of the fact that the accused was absconding. Unless the accused wilfully defaulted in appearing in court such default is proved to the satisfaction of the court it cannot be said that the accused has forfeited the bond. Forfeiture arises only as a result of or consequence of a wilful default, in appearing in court. Forfeiture of bond is to be proved satisfactorily. As per Section 446 of the Code, it it is proved to the satisfaction of the court that the bond has been forfeited, the court shall record grounds of such "proof" and proceed to impose penalty etc. under section 446.

5. But, the order under challenge shows that the court has not applied its mind to the mandatory requirement under section 446 of the Act. The court has not recorded the proof of satisfaction that the bond has been forfeited. The non-compliance of the said mandatory requirement vitiates the entire proceedings. It is also clear from the order that the first appellant was not served with notice and hence

she was not able to bring the above facts to the notice of the court, since she was away in a foreign country.

6. It can also be seen from the order that the court has passed a premature order sentencing the appellant to undergo simple imprisonment. Such order can be passed only after taking steps to recover the penalty and only if the amount is not paid. The court is bound to give time to the appellant to pay the penalty and only thereafter, recovery can be made. Even before affording an opportunity for payment or taking steps for recovery of the amount, the court cannot assess a proper period of sentence to be imposed. The appropriate period of sentence will depend upon the amount, if any, paid or recovered.

In the above circumstances, the order under challenge is illegal. It is set aside. The trial court is directed to take the case on file and dispose of the same in accordance with law, strictly in compliance with Section 446 of the Code. The parties shall appear before the trial court on 15.2.2007.

Admitted with notice to learned Public Prosecutor, heard both sides. This appeal is allowed.

K. HEMA, JUDGE.

Krs.